

No. 22A1027

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**In the Supreme Court of the United States**

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AMANDA GUNASEKARA,

*Appellant,*

v.

MATTHEW BARTON AND  
MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE

*Respondents,*

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*ON APPLICATION FOR STAY, RECALL OF MANDATE AND INJUNCTIVE  
RELIEF TO THE SUPREME COURT OF MISSISSIPPI*

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**RESPONSE OF MATTHEW BARTON TO THE APPELLANT'S  
EMERGENCY APPLICATION FOR STAY, RECALL OF MANDATE  
AND INJUNCTIVE RELIEF, AND ALTERNATIVE PETITION FOR  
WRIT OF CERTIORARI AND SUMMARY VACATUR**

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## **QUESTION PRESENTED**

Whether the Honorable Justice should grant an emergency stay to a candidate who did not bring her constitutional claims before the trial court and did not include the state in any of the proceedings?

**PARTIES TO THE PROCEEDING  
AND RULE 29.6 STATEMENT**

The parties to the proceeding before the Mississippi Supreme Court whose judgment is sought to be reviewed, are:

- \* Amanda Gunasekara, appellant below and petitioner here.
- \* Matthew Barton, appellee below, and respondent here.
- \* Mississippi Republican Executive Committee, appellee below, and respondent here.

**TABLE OF CONTENTS**

QUESTION PRESENTED ..... i

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT ..... ii

TABLE OF AUTHORITIES ..... iv

INTRODUCTION..... 1

OPINIONS BELOW..... 2

STATEMENT OF THE CASE..... 2

REASONS TO DENY THE APPLICATION FOR STAY ..... 6

CONCLUSION..... 25

## TABLE OF AUTHORITIES

### Cases:

<i>Barnes v. Singing River Hospital</i> , 733 So.2d 199 (Miss. 1999) . . . . .	8
<i>Beard v. Kindler</i> , 558 U.S. 53 (2009). . . . .	7, 8
<i>Chimento v. Stark</i> , 414 U.S. 802, 94 S.Ct. 125, 38 L.Ed. 2d 39 (1973) . . . . .	19, 21
<i>Dedeaux Utility Co. v. City of Gulfport</i> , 63 So.3d 514 (Miss. 2011) . . . . .	10
<i>Dunn v. Blumstein</i> , 405 U.S. 330 (1972). . . . .	18
<i>Educational Placement Services v. Wilson</i> , 487 So.2d 1316 (Miss.1986). . . . .	9
<i>Fulton v. City of Philadelphia</i> , 141 S.Ct. 1686 (2021) . . . . .	24
<i>Hall v. State</i> , 168 So.3d 946 (Miss. 2015) . . . . .	4
<i>Hankins v. State of Hawaii</i> , 639 F. Supp. 1552, 1555 (Dist Ct. Hawaii 1986) . . . .	21
<i>Gunasekara v. Barton</i> , 2023-EC-00377 (Miss. 2023) . . . . .	5
<i>In re Adoption of D.D.H.</i> , 268 So.3d 449 (2018) . . . . .	10
<i>In re Contest of November 8, 2011 General Election of Office of N.J. General Assembly, Fourth Legislative Dist., 48 A.3d 1164, 1185 (N.J. 2012)</i>	21
<i>James v. Westbrook</i> , 275 So. 3d 62 (Miss. 2019) . . . . .	5, 9
<i>Kanapaux v. Ellisor</i> , 419 U.S. 891, 95 S.Ct. 169, 42 L.Ed.2d 136 (1974) . . . . .	20
<i>Lee v. Kemna</i> , 534 U.S. 362, 122 S.Ct. 877, 151 L.Ed.2d 820 (2002) . . . . .	7
<i>Merrill v. Milligan</i> , 142 S.Ct. 879 (2022) . . . . .	15
<i>Miss. Dep't of Revenue v. AT &amp; T Corp.</i> , 202 So.3d 1207 (Miss. 2016) . . . . .	9
<i>Mogk v. City of Detroit</i> , 335 F.Supp. 698 (E.D.Mich.1971) . . . . .	21
<i>Nken v. Holder</i> , 434, 129 S.Ct. 1749 (2006) . . . . .	14

<i>Oktibbeha Cty Hosp. v. Miss. State Dep't of Health</i> , 956 So.2d 207 (Miss.2007) . . .	10
<i>Purcell v. Gonzalez</i> , 549 US 1 (2006) . . . . .	15
<i>Roberts v. Miss. State Highway Comm'n</i> , 309 So.2d 156 (Miss. 1975) . . . . .	10
<i>Revenel v. Dekle</i> , 218 SE 2d 521 (SC 1975) . . . . .	20
<i>Smith v. Fluor Corp.</i> , 514 So.2d 1227 (Miss.1987) . . . . .	9
<i>Sosna v. Iowa</i> , 419 U.S. 393, 406, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975) . . . . .	19
<i>Sununu v. Stark</i> , 420 U.S. 958, 95 S.Ct. 1346, 42 L.Ed.2d 435 (1975) . . . . .	20
<i>Virk v. Miss. Dep't of Revenue</i> , 133 So.3d 809 (Miss. 2014) . . . . .	9
<b>Statutes:</b>	
Miss. Code §23-15-300 . . . . .	23
Miss. Code §23-15-961(4) . . . . .	3, 4, 12
Miss. Code §27-7-5 . . . . .	25
Miss. Code 77-1-1 . . . . .	17
<b>Rules:</b>	
Federal Rule of Civil Procedure 5.1. . . . .	7
Mississippi Rule of Appellate Procedure 44 . . . . .	9
Mississippi Rule of Civil Procedure 24(d) . . . . .	5, 6, 7, 9, 10
Mississippi Rule of Civil Procedure 81 . . . . .	5
<b>Constitution:</b>	
Art. I, § 2, cl. 2 of the United States Constitution . . . . .	19
Art. I, § 3, cl. 3 of the United States Constitution . . . . .	19
Art. II, § 1, cl. 5 of the United States Constitution. . . . .	19

*Mississippi Constitution of 1890, Article V, §133* . . . . . 4

*Mississippi Constitution of 1890, Article III, §8* . . . . . 4

**Other Authorities:**

E. Mazo, *Residency and Democracy: Durational Residency* . . . . . 19, 23, 24  
*Requirements from the Framers to the Present*,  
43 Fla. St. U. L. Rev. 611 (2016)

TO THE HONORABLE SAMUEL A. ALITO, JR., ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE FIFTH CIRCUIT:

## INTRODUCTION

2023 is an election year in Mississippi with the primary set for August 8, 2023. The sample ballot must be published by June 16 with absentee voting commencing on July 10. This emergency application for stay involves a candidate who was disqualified through an expedited election contest process allowed under Mississippi law. The election contest was filed on February 24, 2023 and the entire process was completed with the Mississippi Supreme Court affirming the trial court's disqualification on May 11, 2023. The candidate did not allege any constitutional issues until the appeal, depriving the trial court of any opportunity to consider those claims. The Mississippi Supreme Court properly refused to consider those claims having been raised for the first time on appeal.

The candidate now claims that an emergency exists because the Mississippi Supreme Court refused to consider her constitutional argument due to a procedural rule. This claim is a red herring designed to create a constitutional claim where none exists. Mississippi, like other courts, requires claims to be raised at the trial court. This candidate claims that she should not have been required to join the Attorney General of a State where the constitutionality of the state's constitution or statutes is challenged and the proper state official was never named as a defendant. Clearly, the Mississippi Supreme Court was well within its discretion to decline to address the constitutional issue in an expedited proceed when the issues were raised for the first time on appeal with no inclusion of the State's Attorney General.

She is effectively asking the Supreme Court to change the rules in the middle of the game without including one of the teams.

For clarification, the Mississippi Attorney General is the proper party in Mississippi to defend the merits of the Appellant's claims. Further, the Mississippi Secretary of State, the State's election official, is the proper party in interest who should be the proper defendant in this case. Therefore, the Appellee, Matthew Barton, will only address the merits of the request for a stay with the expectation that the United States Supreme Court should require the Appellant to join the Mississippi Secretary of State and the Mississippi Attorney General if the appeal is permitted to advance.

For these and other reasons cited, herein, this Honorable Justice should deny the Application for a Stay.

### **OPINIONS BELOW**

The candidate was disqualified by the decision of the Circuit Court of Hinds County, Mississippi. That decision was affirmed by the Opinion of the Mississippi Supreme Court on May 11, 2023. The candidate's request for a stay was also denied on May 24, 2023. These documents are in the Appellant's Appendix.

### **STATEMENT OF THE CASE**

Amanda Gunasekara, (hereinafter "the candidate") along with two other candidates, qualified to run for the office of Public Service Commissioner for the Northern District of Mississippi. Mississippi law requires that she must have been a citizen of the State of Mississippi for five years from the date of the general election and lived within the Northern District of Mississippi for two years prior to

the date of the general election. Therefore, she must have been a citizen of Mississippi beginning on November 7, 2018 and a resident of the district beginning November 7, 2021 in order to qualify.

As a marketing tool, she advertised that she has been a lifelong Mississippian with deep roots in the state despite the fact that she was born in Texas, did not move to Mississippi until she was almost 14 years old and left the state after she graduating from law school. She finally moved back to Mississippi in the fall of 2021 after she sold her house in the District of Columbia. After she filed her qualifying documents, a concerned citizen, Matthew Barton, did a simple search of the voting records of the District of Columbia and determined that she had voted in an election there on November 6, 2018, the day before her five-year Mississippi residency requirement was to begin. As a conservative Republican attorney, Barton determined to contest her qualifications with the Republican Executive Committee. There, the Candidate called his election contest “comical” and insulted his claim.

On February 9, 2023, Barton wrote a letter to the Mississippi Republican Executive Committee to contest the qualifications of the candidate and the candidate responded. The Republican Executive Committee conducted a hearing on February 16, 2023 and overruled Barton’s objections.

Barton then timely filed a Petition to Contest Qualifications with the Circuit Court of Hinds County, Mississippi on February 24, 2023 pursuant to Miss. Code §23-15-961(4). Following the expedited procedure as outlined in the statute, a hearing was conducted on March 22, 2023. The following day, the Special Circuit Judge concluded that the candidate did not meet the citizenship requirements to

qualify as a candidate. The candidate appealed to the Mississippi Supreme Court that affirmed the trial court's decision on May 11, 2023 in an expedited appeal.

Candidates for most statewide offices including Mississippi Public Service Commissioner must be citizens or residents of Mississippi for more than five years before the general election. Miss. Code §23-15-961 provides that Public Service Commissioners "shall each possess the qualifications prescribed for the Secretary of State." The *Mississippi Constitution of 1890, Article V, §133* then provides that a candidate for Secretary of State and thus, Public Service Commissioner, must be "a citizen of the state for five years next preceding the date of his election. . ." The definition of a citizen is found in *Article III, §8* of the 1890 Constitution as being a "resident of this state." Finally, the Mississippi Supreme Court found that "Residency under Mississippi election law is based on a person's domicile." *Hall v. State*, 168 So.3d 946, 951 (Miss. 2015). As to the merits of the appeal, the Mississippi Supreme agreed with the trial court in that the candidate had not been domiciled within the State of Mississippi since November 7, 2018, the date that is at least five years prior to the November 7, 2023 general election and was, therefore, disqualified as a candidate.

For the first time on appeal, the candidate claimed that the five year residency requirement violated her Fourteenth Amendment rights as the rule was applied to her. In response, the Mississippi Supreme Court issued the following opinion regarding the Candidate's constitutional claim:

### **III. Whether the trial court's application of the five-year citizenship requirement violates the Fourteenth Amendment of the United States Constitution.**

¶54. Lastly, Gunasekara argues that the trial court's application of the five-year citizenship requirement in this case violates the Fourteenth Amendment. Gunasekara states that she is not challenging the constitutionality of the five-year residency requirement as a whole, but only "[w]hether the trial court's application of the five-year durational-citizenship requirement in this case violates the Fourteenth Amendment."

¶55. Under Mississippi Rule of Civil Procedure 24(d), when the constitutionality of a statute is challenged, the Attorney General of the State of Mississippi must be notified "within such time as to afford him an opportunity to intervene and argue the question of constitutionality." M.R.C.P. 24(d). Mississippi Rule of Civil Procedure 81(a)(4), however, provides that the Mississippi Rules of Civil Procedure "apply to all civil proceedings but are subject to limited applicability in the following actions which are generally governed by statutory procedures . . . (4) proceedings pertaining to election contests . . . ." M.R.C.P. 81(a)(4). Even so, this Court previously has declined to address the constitutionality of a statute in an election contest pursuant to Rule 24(d). See *James v. Westbrooks*, 275 So. 3d 62, 66 (Miss. 2019).

¶56. Although Gunasekara argues that she is attacking the constitutionality of the statute as it was applied in this case, Gunasekara's arguments attack the five-year residency requirement as a whole. Resolution of this issue is of broad public importance. Accordingly, as a matter of public policy, the attorney general should be given an opportunity to argue the question of constitutionality. Therefore, we decline to address the issue at this time.

*Gunasekara v. Barton*, ¶54-56 (May 11, 2023)

The Mississippi Supreme Court was following the well-established rule that claims must be raised before the trial court. The candidate was well aware of the five year citizenship requirement and could have raised her constitutional claims before the trial court but chose not to do so. Had she brought those claims before the trial court, she would have been required to join the Mississippi Secretary of

State, as the State's election official, and would have been required to provide notice the Mississippi Attorney General. Instead, she sat on those rights and did not raise those until her appeal. The Mississippi Supreme Court properly rejected the constitutional claim for the first time on appeal.

## **REASONS FOR DENYING THE APPLICATION**

### **I. The procedure applied by the Mississippi Supreme Court to require the involvement of the Mississippi Attorney General does not violate the candidate's due process rights.**

#### **A. What does the Mississippi Rule say?**

The Mississippi Rules of Civil Procedure include a requirement that the Attorney General of Mississippi be given notice of any proceeding where the constitutionality of a statute is questioned. Rule 24(d) of the Mississippi Rules of Civil Procedure provides that:

**(d) Intervention by the State.** In any action. . . (2) for declaratory relief . . . in which a declaration or adjudication of the unconstitutionality of any statute of the State of Mississippi is among the relief requested, the party asserting the unconstitutionality of the statute shall notify the Attorney General of the State of Mississippi within such time as to afford him an opportunity to intervene and argue the question of constitutionality.

When the candidate qualified to run for the office of Public Service Commission, she was fully aware of the qualifications that included the five year citizenship requirement. When she responded to Barton's Petition to Contest Qualifications, she had ample opportunity to raise her constitutional claims before the trial court but declined to do so. It was only after the trial court applied the rules that she decided that the rule was unfair. Regardless, after she raised her

constitutional challenge for the first time on appeal, she did not include the Mississippi Attorney General in that process.

**B. Is the requirement to include the Attorney General a firmly established rule where there is a constitutional challenge to a Mississippi statute?**

In her application, the candidate claims that Rule 4(d) of the Mississippi Rules of Civil Procedure does not apply to her case and that the Mississippi Supreme Court has applied the Rule inconsistently. In her application, she titled the claim as “The bar is not firmly established or regularly followed.” (Appellant’s Application for Stay, p. 13).

In the context of Federal *habeus corpus* petitions, the candidate cites *Beard v. Kindler*, 558 U.S. 53 (2009) for the proposition that “The question whether a state procedural ruling is adequate is itself a question of federal law.(at 617 citing *Lee v. Kemna*, 534 U.S. 362, 375, 122 S.Ct. 877, 151 L.Ed.2d 820 (2002). We have framed the adequacy inquiry by asking whether the state rule in question was ‘firmly established and regularly followed.’” *Id* at 376. (citations omitted)”

As to the Rule being “firmly established and regularly followed”, it is significant to note that the Federal Rules of Civil Procedure include a similar rule.

**Rule 5.1. Constitutional Challenge to a Statute**

(a) Notice by a Party. A party that files a pleading, written motion, or other paper drawing into question the constitutionality of a federal or state statute must promptly:

(1) file a notice of constitutional question stating the question and identifying the paper that raises it, if:

(A) a federal statute is questioned and the parties do not include

the United States, one of its agencies, or one of its officers or employees in an official capacity; or

(B) a state statute is questioned and the parties do not include the state, one of its agencies, or one of its officers or employees in an official capacity; and

(2) serve the notice and paper on the Attorney General of the United States if a federal statute is questioned—or on the state attorney general if a state statute is questioned—either by certified or registered mail or by sending it to an electronic address designated by the attorney general for this purpose.

In the *Beard* case, cited above, the Supreme Court noted that “it would seem particularly strange to disregard state procedural rules that are substantially similar to those to which we give full force and effect in our own courts.” *Beard* at 618. Therefore, the Federal Rules and Mississippi Rules require the participation of the respective Chief Law Enforcement Officer in any proceeding where the constitutionality of a statute or provision is before a court. This is a firmly established rule in state and federal courts.

**C. Has the Mississippi Supreme Court consistently followed Rule 4(d) in election contests and other matters?**

In *Barnes v. Singing River Hospital*, 733 So.2d 199, 202 (Miss. 1999), Barnes argued for the first time on appeal that the Mississippi Tort Claims Act was not constitutional. The Supreme Court refused to consider the constitutional challenge because it was not raised at the trial court and because the Attorney General had not been notified:

¶ 9. As *Singing River* points out, the constitutionality issue is barred, because it was not raised in the trial court and because the Attorney General's Office was not properly notified. "We accept without hesitation the ordinarily sound principle that this Court sits to review

actions of trial courts and that we should undertake consideration of no matter which has not first been presented to and decided by the trial court. We depart from this premise only in unusual circumstances." *Educational Placement Services v. Wilson*, 487 So.2d 1316, 1320 (Miss.1986). "The law has been well settled that the constitutionality of a statute will not be considered unless the point is specifically pleaded." *Smith v. Fluor Corp.*, 514 So.2d 1227, 1232 (Miss.1987). Furthermore, Rule 24(d) of the Mississippi Rules of Civil Procedure requires that proper notice be given to the Attorney General when the constitutionality of a statute is challenged "to afford [her] an opportunity to intervene and argue the question of constitutionality." Miss. R. Civ. P. 24(d). Rule 44(a) of the Mississippi Rules of Appellate Procedure similarly requires service of any appellate brief challenging the validity of a statute "on the Attorney General, the city attorney, or other chief legal officer of the governmental body involved." M.R.A.P. 44(a). "Except by special order of the court to which the case is assigned, in the absence of such notice neither the Supreme Court nor the Court of Appeals will decide the question until the notice and right to respond contemplated by this rule has been given to the appropriate governmental body." M.R.A.P. 44(c). The Barneses' failure to raise the issue of the constitutionality of § 11-46-11(3) at trial or to notify the Attorney General's Office of their challenge of the statute results in the procedural bar on this issue.

In the more recent case of *James v. Westbrook*, 275 So.3d 62, 67 (Miss. 2019), the Mississippi Supreme Court applied the exact same rule in an election contest. James was a candidate for a judicial office and Westbrook was his opponent. James asked the trial court to set aside an election and declare him the winner. At the trial court, James raised a constitutional challenge but did not include the Mississippi Attorney General. The Supreme Court said:

As to Westbrook's second claim, the attorney general was not provided a copy of her brief as required by Mississippi Rule of Appellate Procedure 44. The issue is therefore procedurally barred. *Miss. Dep't of Revenue v. AT & T Corp.*, 202 So.3d 1207, 1209 n.1 (Miss. 2016) ("Failure to serve a copy of the appellate brief on the Attorney General of the State of Mississippi results in application of a procedural bar." (citing *Virk v. Miss. Dep't of Revenue*, 133 So.3d 809, 814-15 (Miss. 2014))). Further, "[t]he constitutionality of a statute will

not be determined unless absolutely necessary to determine the merits of the litigation in which the constitutional issue has been presented." *In re Adoption of D.D.H.*, No. 2016-CA-01530-SCT, 268 So.3d 449, 451-52, 2018 WL 372381, at \*2 (Miss. Jan. 11, 2018) (quoting *Roberts v. Miss. State Highway Comm'n*, 309 So.2d 156, 160 (Miss. 1975)). An examination of the constitutionality of the statutes is not "absolutely necessary" to resolve this appeal.

The only case that the candidate argues applied a different standard is *Dedeaux Utility Co. v. City of Gulfport*, 63 So.3d 514, 534 (Miss. 2011). The candidate's argument is misplaced. The trial court denied the constitutional challenge to an eminent domain statute. Dedeaux asked the Mississippi Supreme Court to dismiss the constitutional challenge because of the failure to serve the Attorney General. The Court declined to dismiss the case on those grounds saying

Miss. R. Civ. P. 24(d)(2). Mississippi Rule of Appellate Procedure 44(a) provides, in pertinent part, that:

[i]f the validity of any statute ... is raised in the Supreme Court ... and the state ... which enacted or promulgated it is not a party to the proceeding, the party raising such question shall serve a copy of its brief, which shall clearly set out the question raised, on the Attorney General....

Miss. R.App. P. 44(a). "To comply with these rules, a party challenging the constitutionality of a legislative enactment must serve a copy of his or her brief on the Attorney General." *Oktibbeha County Hosp. v. Miss. State Dep't of Health*, 956 So.2d 207, 211 (Miss.2007). But this Court has stated further that a claim which does not seek to invalidate a statute, but only challenges the constitutionality of its application, does not require Rule 24(d)(2) notification.

*Dedeaux* at ¶53.

In the case *sub judice*, the Mississippi Supreme Court specifically addressed the distinction between seeking to invalidate a statute versus challenging how the

statute is applied to a particular individual. As cited above, the Court noted that the candidate stated in her brief that “Although Gunasekara argues that she is attacking the constitutionality of the statute as it was *applied in this case*, Gunasekara's arguments attack the five-year residency requirement *as a whole*.” Gunasekara at ¶56. (Emphasis added) The Court found that although the candidate said that she was only attacking the application of the five year requirement to her case but, instead, argued to declare the entire statute as being unconstitutional. Therefore, the Attorney General should have been given notice. Again, the Mississippi Supreme Court cited the appropriate rule and applied it consistently.

Therefore, the Mississippi Supreme Court did not sidestep a constitutional claim. The Court followed its longstanding procedural requirement and correctly determined that the constitutional claim was procedurally barred. This procedure is consistent with the companion federal rule.

**D. Finally, the candidate says that she met the requirement by serving a copy of her brief on the Mississippi Attorney General.**

As cited above, the procedure for resolving election contests follows an expedited process. The Mississippi Supreme Court ordered the candidate’s brief to be filed by April 13. Barton’s brief was due April 18 and the candidate’s reply brief was due on April 20. Included on page 36 of the Appellant’s Appendix is a copy of the letter to the Mississippi Attorney General dated April 19. This letter did not arrive at the Mississippi Attorney General’s office until after the briefing was completed. As cited above, Rule 44(a) of the Mississippi Rules of Appellate

Procedure also require that copies of any brief be served on the Attorney General. This failure denied the Attorney General with an opportunity to participate meaningfully in the case and was a significant and valid reason for the Mississippi Supreme Court to refuse to consider the candidate's argument.

**II. The Mississippi Supreme Court applied long standing, well-established law in refusing to consider constitutional arguments that were raised for the first time on appeal.**

Miss. Code §23-15-961 provides the exclusive procedure for contesting the qualifications of candidates for primary election. The procedure creates a shortened process whereby the qualifications can be determined prior to the primary election in August of the general election year.

For the first time on appeal, she claimed that:

To be sure, durational residency requirements for holding public office are not *per se* unconstitutional. But they must survive strict scrutiny when tailored to the purposes they aim to advance. The trial court's application of Art. V. § 133 to disqualify Mrs. Gunasekara's candidacy for public office fails strict scrutiny and therefore this Court should reverse the trial court's order as being in violation of the U.S. Constitution.

(Brief of Amanda Gunasekara to the Mississippi Supreme Court at page 19)

In her brief, she specifically argued that the trial court's application of the five year citizenship requirement violated the candidate's constitutional rights. To be clear, the *trial court* was not asked to consider whether the candidate's constitutional rights were being violated. She could have asked the trial court to declare the five year citizenship requirement as unconstitutional but she was silent in that regard. Instead, she only argued that she met the five year requirement. By placing all of her proverbial eggs in one basket, she deprived the trial court of

the opportunity to determine whether her constitutional rights were violated.

Based on her failure to raise the issue at the lower court, there were no findings regarding the reasonableness or constitutionality of the length of the residency requirement that the Mississippi Supreme Court could consider.

**III. Granting a stay and allowing the candidate to participate in the election assumes that she is otherwise qualified under whatever new rule is applied.**

In the case *sub judice*, when accused of seeking to declare the entire residency requirement system as unconstitutional, she specifically disagreed saying, “Mrs. Gunasekara presents a much narrower issue: ‘Whether the trial court’s application of the five-year durational-citizenship requirement in this case violates the Fourteenth Amendment.’” (Candidate’s Reply Brief to Miss. Supreme Court, p. 7). Therefore, the Candidate has already agreed that a durational requirement was not *per se* unconstitutional. Instead, she was arguing that a shorter standard would have been constitutional but that a five year standard was too long.

If the candidate had raised her constitutional claim before the trial court, there would be ruling that would have determined whether Mississippi’s five year citizenship requirement was constitutional. If the trial court and/or appellate court had determined that any part of the statute was unconstitutional, then the court would have set a different standard.

If the trial court had determined that the five year citizenship requirement was too long then it could have determined that a shorter, more appropriate period

was constitutional. Obviously, the candidate would have been qualified if there had been no durational citizenship requirement. However, if the Mississippi courts or the United States Supreme Court were to find that a three year citizenship requirement was constitutional, then the candidate would fail to meet that standard.

Since the candidate did not argue any replacement standard to any court in Mississippi or to this Court, then it is impossible to determine whether she would meet any standard that this court might determine to be constitutional unless all residency requirements are invalid. If the candidate agrees that durational residency requirements could be constitutional, granting her a stay and allowing her to run would require this court to assume that she meets that imaginary standard. The Honorable Justice should deny the candidate's request for a stay.

**VI. The granting a stay six days before the date for the party to turn in the name of qualified candidates is against the public interest.**

This Court has said that when considering a motion for a stay, as with other temporary injunctive relief, the Supreme Court must evaluate (1) the movant's likelihood of success on the merits; (2) whether the movant will suffer irreparable injury absent a stay; (3) whether the issuance of a stay is likely to injure others, including any party opposing the stay; and (4) the public interest. *Nken v. Holder*, 434, 129 S.Ct. 1749 (2006).

However, this Court has also been reluctant to intervene in election contests close to an election. "This Court has repeatedly stated that federal courts ordinarily should not enjoin a state's election laws in the period close to an election, and this

Court in turn has often stayed lower federal court injunctions that contravened that principle.” *Merrill v. Milligan*, 142 S.Ct. 879, 880 (2022).

**A. The Court should honor the Mississippi Supreme Court’s order that decline to stay its order.**

From *Purcell v. Gonzalez*, 549 US 1 (2006) came the “Purcell Principle” that says:

That principle—known as the *Purcell* principle—reflects a bedrock tenet of election law: When an election is close at hand, the rules of the road must be clear and settled. Late judicial tinkering with election laws can lead to disruption and to unanticipated and unfair consequences for candidates, political parties, and voters, among others. It is one thing for a State on its own to toy with its election laws close to a State's elections. But it is quite another thing for a federal court to swoop in and re-do a State's election laws in the period close to an election.

*Merrill* at 881.

This candidate had ample opportunity to raise her claims in the state court but declined to do so. It was only after she was disqualified that her dislike of the Mississippi election rules became an issue. She could have contested the Mississippi election laws in state or federal court, in this current proceeding or in a separate case. Instead, she waited too late to give a trial court an opportunity to even consider the merits of her claim. The Court should decline to intervene in the Mississippi election cycle at this late date.

**B. The candidate will not suffer irreparable harm.**

The candidate argues that she will suffer some irreparable harm if she is not permitted to run in the current election cycle and that her constitutional rights are being violated. Again, she does not claim that durational requirements are *per se*

unconstitutional. She only claims that her rights are being violated by the application of the five-year requirement.

First, the candidate moved back to the District of Columbia in March, 2020 and in July, 2020 she declared, under oath in writing, that the District of Columbia would remain her primary residence until the fall of 2021 when she sold her residence there and returned to Mississippi permanently. Therefore, the candidate will be eligible to run in the next election in 2027 if she remains a citizen of Mississippi. There is no emergency nor will the candidate or public suffer any harm. She voluntarily chose to exercise her rights to be a citizen of the District of Columbia and enjoy the privileges accordingly. She cannot now say that she will suffer some great harm because she must wait to enjoy all of the benefits of now being a citizen of Mississippi.

**C. Whether the stay will injure others or the public interest.**

While the two other candidates in this election are not participants to this Application of Stay, they will suffer harm if the stay is granted. These candidates waited for their five years to qualify to run for the respective office along with thousands of other candidates across Mississippi. Granting a stay in this case would effectively give a special privilege to one candidate who has determined that she was not obligated to follow the same rules. Conversely, there may have been other candidates who did not meet the five year citizenship requirement but would have run if the requirement would have been different. Applying a different standard to this candidate would be inherently unfair to those who chose not to run.

**D. The candidate's suggestion that the people should be able to decide the candidate of their choice fails to recognize that the people have spoken through their elected representative who have validated these specific citizenship requirements over a dozen times since 1939.**

It is significant to note that the five year citizenship requirement for the Public Service Commission is not set by the Mississippi Constitution. Instead, Miss. Code 77-1-1 is a statute passed by the Mississippi Legislature that set the five-year citizenship requirement as being the same as the Secretary of State.

The office of the Public Service Commission was created in the early 1930's. Beginning in 1938, the Mississippi Legislature created a repealer on the office. In 2020, Mississippi Senate Bill 2386 was approved by the Legislature and signed by the Governor to extend the existence of the Mississippi Public Service Commission. That bill included Miss. Code §77-1-51 that provides that the sections of the Mississippi Code "which created the Public Service Commission and prescribe its powers and duties, shall stand repealed as of December 31, 2024."

There are two important considerations in this legislation. First, there is no guarantee that the Mississippi Legislature will extend the repealer such that the office for which this candidate seeks may not exist beyond 2024. Second, the Mississippi Legislature revisits this set of statutes approximately every four years. Therefore, if this candidate believes that the five-year citizenship is too long or should be eliminated, the Mississippi Legislature will be required to vote on this issue in less than eight months. While that will not affect her ability to participate in this election, it is a clear opportunity to allow the Legislative branch of

government to exercise its opportunity to change this law without the intervention of the courts. To be clear, this candidate has never suggested that the Mississippi Legislature has declined to consider any request from her to shorten the citizenship period. Interestingly enough, the Mississippi Legislature was in session in March and April, 2023 while this case was before the Hinds County Circuit Court where could have asked the Legislature to change the law but chose not to.

**E. It is unlikely that the Court will grant certiorari in this matter.**

Beginning with the *Dunn v. Blumstein*, 405 U.S. 330 (1972) decision, the United States Supreme Court struck down voter residency requirements as violating the Fourteenth Amendment, as they are not necessary to further a compelling state interest. The Court struck down a Tennessee law that required a person be a resident for one year before he could vote. The Court reasoned that “In sum, durational residence laws must be measured by a strict equal protection test: they are unconstitutional unless the State can demonstrate that such laws are "necessary to promote a compelling governmental interest." at 343.

The state and federal courts have been reluctant to apply this line of reasoning to durational requirements for candidate for public office. While the candidate attacks the five year requirement as being unduly burdensome, the candidate has only been a citizen of Mississippi since the fall of 2021 when she sold her residence in Washington, D.C. and moved to Oxford. As cited above, the Candidate declared Washington, D.C. to be her homestead and primary residence throughout 2021 so she has not been unduly burdened by the five year

requirements. She barely meets the two year residency requirement to live in the Northern District. Regardless, Mississippi's residency requirements have a legitimate purpose and have been widely upheld as constitutional for over 150 years.

At the outset, we should note that the United States Supreme Court has "expressly disclaimed" the idea that states cannot impose durational residency requirements. *Sosna v. Iowa*, 419 U.S. 393, 406, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975). Indeed, the United States Constitution imposes durational residency requirements on representatives (7 years), senators (9 years) and presidents (14 years), U.S. Const., art. I, § 2, cl. 2; art. I, § 3, cl. 3; and art II, § 1, cl. 5. Therefore, residency requirements are not, *per se*, unconstitutional.

There have been many cases in the courts challenging durational residency requirements as they apply to candidates for office. But whereas durational residency requirements for voters were struck down under such challenges, courts have largely upheld the durational residency requirements for candidates. In so doing, they have drawn a sharp distinction between the right to vote and the right to be a candidate for office. In part, the durational residency requirements for candidates have been more difficult to challenge because they have long been enshrined in state constitutions.

E. Mazo, *Residency and Democracy: Durational Residency Requirements from the Framers to the Present*, 43 Fla. St. U. L. Rev. 611 (2016)

While the United States Supreme Court has not issued any precedential opinion on the constitutionality of durational residency requirements for candidates, the Court has summarily affirmed decisions upholding such requirements. For example, in *Chimento v. Stark*, 414 U.S. 802, 94 S.Ct. 125, 38 L.Ed. 2d 39 (1973), the Supreme Court affirmed without opinion a decision of a

three judge panel of the Circuit Court declaring the seven year residency requirement for New Hampshire governor to be constitutional. In discussing that case, the South Carolina Supreme Court noted in *Revenel v. Dekle*, 218 SE 2d 521 (SC 1975) that:

The [three judge panel] opinion of the court points out that "29 states require five or more years, 10 states require seven or more years and two states require ten years" residency before one may serve as Governor. In commenting upon the purpose of such a requirement the court said "it ensures that the chief executive officer of New Hampshire is exposed to the problems, needs, and desires of the people whom he is to govern, and it also gives the people of New Hampshire a chance to observe him and gain firsthand knowledge about his habits and character."

Additionally, in *Kanapaux v. Ellisor*, 419 U.S. 891, 95 S.Ct. 169, 42 L.Ed.2d 136 (1974), the Court again affirmed without opinion a decision of the District Court of South Carolina to uphold its five-year durational residency requirement for governor.

Also, in *Sununu v. Stark*, 420 U.S. 958, 95 S.Ct. 1346, 42 L.Ed.2d 435 (1975), the Supreme Court affirmed without opinion the judgment of a three judge panel that found that the Fourteenth Amendment was not violated by another provision of the New Hampshire Constitution the required seven years residency for a state senator.

In 2011, the New Jersey Superior Court explained the rationale for residency requirements in affirming a residency requirement there:

"This long-standing Constitutional provision" furthers "the State's legitimate interest in assuring that a candidate for State legislative office has a sufficient durational nexus to his or her legislative district, to be familiar with the issues of concern to its residents, and to allow

the electorate to become familiar with the candidate." This "allows a candidate the issues and concerns that are important to the people he or she seeks to represent," while allowing the people "the necessary opportunity to become familiar with a potential candidate."

*In re Contest of November 8, 2011 General Election of Office of N.J. General Assembly, Fourth Legislative Dist.*, 48 A.3d 1164, 1185 (N.J. 2012)

In 1986, the United States District Court for Hawaii, in *Hankins v. State of Hawaii*, 639 F. Supp. 1552, 1555 (Dist Ct. Hawaii 1986), the Court upheld a five year residency requirement concluding:

Unlike the situation in *Dunn*, the requirement at issue here does not force a person to "choose between travel and the basic right to vote," because there is no analogous basic right to candidacy. *Id.* Although a new resident is "penalized" in the sense that he is precluded from running for governor for five years, the activity in which he seeks to engage is not itself a fundamental right. Accordingly, because the law hinders the exercise of no fundamental right, the durational residence requirement does not truly penalize the right to travel.

Finally, that same court outlined the compelling state interest that existed for a candidate who was from Hawaii but had left the state and then returned:

The State has a legitimate interest in maintaining a responsive and responsible government. Indisputably, candidates who possess a familiarity with, and an awareness of, local conditions are a commodity desirable to state residents. That the voters are more likely to come into personal contact with the candidates, prior to election, if a residency requirement is imposed is also self-evident.

At issue here is more than simply a desire on the part of the chief election officer that gubernatorial candidates be known to the electorate. The State has a strong interest in the assurance that its governor will be a person who understands the conditions of life in Hawaii. This concern has "particular relevance in a small and comparatively sparsely populated state." *Chimento*, *supra*, at 1215.

Notwithstanding his best intentions to the contrary, a prospective candidate who has spent a significant length of time in residence away from this State (even though he had previously lived in the Islands for

more than ten years) has arguably lost contact with the crises, the culture, and the people of Hawaii. The issue before this court is simply whether the State can seek to correct for such distance-born insensitivity by imposing a five-year durational residency requirement.

Admittedly, the shortcomings of candidates who show themselves inadequately educated as to relevant issues will become apparent to the voters through the mass media. In this electronic age, microscopic examination of any candidate for major public office is bound to accentuate qualitative flaws quite rapidly. Several courts have accordingly invalidated durational residence restrictions on the theory that "if a short sojourn in the community is considered to be a disqualification, the electorate may voice its sentiment at the ballot box." See, e.g., *Mogk v. City of Detroit*, 335 F.Supp. 698, 701 (E.D.Mich.1971).

Nevertheless, the fact, if true, that a residence requirement is not the only method of achieving the state goal does not automatically subject it to invalidation. In rationality review, choosing among alternatives is a task for the State, and not for the federal courts. Walker, *supra*, at 98. This court's inquiry must end where, as here, it finds that there is a rational basis for the challenged law.

Ultimately, the Hawaii court determined that it should be the prerogative of the Legislature or an amendment to the State Constitution rather than the courts if the State wants to change its residency requirements for candidates.

**V. Mississippi has other legitimate public interests in its durational residency requirements for candidates.**

Much has been written as to whether states have a compelling interest in requiring candidates to live in a state or district for a particular period of time. As this Justice is aware, the State of California eliminated durational residency requirements for candidate based on Fourteenth Amendment grounds. However, as cited above, the majority of states have upheld requirements that a much longer than the five year citizenship requirement in this case.

**A. The Founders supported some restrictions.**

At the Constitutional Convention, the Founding Fathers debated the benefit of durational requirements. In the end, they required members of Congress and the President to be residents of the United States for various periods but did not require candidates for Congress to live in any particular place to run for those offices. The reasoning for requiring the President to be a natural born citizen and a member of the Senate to live in the United States for 14 years is essentially the same reasoning forwarded by state and local governments in defense of these restrictions. In writing for the Florida State University Law Review, Professor Mazo noted that the Founding Fathers relied on three distinct justifications for residency requirements: First, “to assure that the candidates were knowledgeable about local matters.” Second, to prevent wealthy foreign nations from purchasing their way to office and third, “to discourage wealthy men from neighboring states from seeking public office elsewhere after they failed to secure election in their own state.”

*Residency and Democracy: Durational Residency Requirements from the Framers to the Present*, 43 Fla. St. U. L. Rev. 611, 650 (2016).

**B. Mississippi’s statute is designed to protect the same interests set by the Founding Fathers.**

As noted above, for this particular office, the Mississippi Legislature is required to revisit its existence every four years including the citizenship requirement. In 2019, the Mississippi Legislature was so concerned these issues that it imposed a new requirement that city and county candidates must live in their particular district for more than two years. See Miss. Code §23-15-300.

Mississippi's requirements are consistent with the majority of the states.

Professor Mazo outlined the various state requirements noting:

Missouri and Oklahoma impose a ten-year durational residency requirement on gubernatorial candidates. A durational residency period of seven years is also not unheard of. Alabama, Alaska, Arkansas, Florida, Massachusetts, New Jersey, Pennsylvania, and Tennessee all require their candidates for governor to be a state resident for seven years before they can be elected to office. Another seventeen states set the durational residency period for governor at five years. In only a handful of states are these durational residency requirements almost entirely absent.

*Id.* at 650.

**C. Mississippi has a compelling interest in collecting taxes.**

The candidate argues that the need for residency requirements is outdated and no longer necessary since the voters have access to sufficient information about candidates in this modern era. She also noted that in order for Mississippi's five year requirement to survive strict scrutiny, Mississippi "must show a compelling interest in enforcing the law against Mrs. Gunasekara specifically." (Application for Stay, p. 30 citing *Fulton v. City of Philadelphia*, 141 S.Ct. 1686, 1881 (2021).)

Virtually all of the reasons articulated to defend citizenship requirements are to protect the voters. That is, the government should require candidates to be a certain age, a registered voter and live there for a specific period of time. However, the state has a more compelling reason to require candidates to live in the state for a particular period of time. That is, they must invest in the place in which she desires to serve.

Article I, Section 8 of the United States Constitution vests Congress with the power to tax. Similarly, Mississippi, like many other states, has a state income tax. See Miss. Code §27-7-5. In its opinion, the Mississippi Supreme Court noted that for tax year 2018, the candidate paid income taxes and renewed her car tags in the District of Columbia. *Gunasekara* at ¶41. Within that five year citizenship requirement is that the candidate must pay her share of income, property, sales and personal property taxes in Mississippi for that five year period. While poll taxes and other impediments to voting have long since been outlawed, every citizen of Mississippi must pay their share of taxes and invest in the state. Mississippi has a compelling interest in requiring every candidate to pay taxes in the area for which they intend to serve. As citizens from at least 2018, Mrs. Gunasekara's opponents paid their share of taxes for that five year period while she did not.

### CONCLUSION

For these reasons, the Application for Stay should be denied.

Respectfully submitted,

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